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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-236

MICHAEL KUTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. A). The order of the district court is not reported (Pet. App. B).

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on June 20, 1975. A petition for rehearing and rehearing *en banc* was denied by the

court of appeals on July 15, 1975 (Pet. 1). The petition for a writ of certiorari was filed on August 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was probable cause to believe that the films "P" and "Getting It On" had been shipped in interstate commerce.

2. Whether search warrants in obscenity cases must be supported by a higher degree of probable cause than in other cases.

3. Whether petitioner was entitled to a hearing on his mid-trial motion to suppress the movie "It Happened In Hollywood."

4. Whether a survey of contemporary standards was properly found inadmissible at trial.

5. Whether contemporary community standards should be measured by the standards of patrons of "adult theaters."

6. Whether the films at issue are obscene.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of interstate transportation of obscene films by common carrier, in violation of 18 U.S.C. 1462 (Counts 1 and 2). Petitioner was also convicted of conspiracy to commit those offenses and to transport obscene films in interstate commerce for distribution, in violation of 18 U.S.C. 1462, 1465,

and 371 (Counts 5 and 6).[1] Petitioner was sentenced to three years' imprisonment on Counts 1, 2, and 5. Two and one-half years of each sentence were suspended, with the remaining six month terms to be served concurrently. He was also fined $2,000 each on Counts 1 and 2 and $1,000 on Count 5. Petitioner was sentenced to three years' probation on Count 6, with the condition that he refrain from transporting obscene material into the Western District of Pennsylvania. The court of appeals affirmed without opinion (Pet. App. A).

1. In 1973 petitioner was the operator of the American Management Company in Cleveland, Ohio. In that capacity he hired Randy Flynn to manage the Penthouse Adult Theater in Pittsburgh and later assigned Flynn to manage the Liberty Theater in Pittsburgh (Tr. 38-39, 293-295). Employees of the theaters were paid by American Management and petitioner received the theaters' receipts (Tr. 39-40, 301).

At petitioner's direction Flynn frequently picked up films for the Liberty Theater at the Greyhound Bus Station (Tr. 44, 95). Petitioner told Flynn that the films were hard-core pornography (Tr. 48).

In early 1974, Flynn obtained from petitioner at the Roxy Theater in Cleveland two copies of a movie entitled "It Happened In Hollywood" and transported the film by Greyhound Bus to Pittsburgh where it

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[1] Co-defendant Anthony Cesario was convicted of receiving obscene films in interstate commerce and of conspiracy to do so, in violation of 18 U.S.C. 1462 and 371 (Counts 3, 4, and 6).

played at the Liberty Theater (Tr. 49).[2] Flynn received another copy of the movie by mail (Tr. 50).[3]

Flynn was replaced as manager of the Liberty Theater about April 1974 by co-defendant Anthony Cesario (Tr. 38, 119, 153). On April 30, Cesario phoned the Greyhound Bus Station from the theater and asked if a package had arrived for him (Tr. 154). Cesario stated to Suzanne Simone, the theater cashier, that he was not going to "hang" for anyone, and then went to the bus terminal (Tr. 155). Cesario returned with a box and said that he had picked up the film to be shown May 3 (Tr. 156, 159).[4] Cesario also told Simone that the next films to be shown were "P" and "Getting It On" (Tr. 156). Both were shown at the Liberty Theater on May 3 (Tr. 254).

Agent Peter Marcoline, Jr., of the Federal Bureau of Investigation ("FBI"), after viewing both films at the Liberty Theater on May 3, prepared an affidavit in support of a search and seizure warrant and presented it to a United States magistrate (Tr. 254-255; Pet. App. D). At Marcoline's request the magistrate himself viewed the movies at the Liberty

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[2] A copy of "It Happened In Hollywood" was seized at the Roxy Theater in February 1974 (Tr. 48, 325); this movie was one of the films forming the basis of the Count 5 conspiracy charge.

[3] Flynn testified against petitioner after having been granted immunity by the district court.

[4] In testifying about Cesario's remarks, Simone used the terms "the film" and "the films" interchangeably (Tr. 156, 170, 181). The return address on the package, which had been sent from Cleveland, was false (Tr. 295).

Theater on May 8 (Tr. 255, 321). The magistrate then issued the warrant and the films were seized (Tr. 255-256).

2. The three films, "P," "Getting It On," and "It Happened In Hollywood" were shown at trial (Tr. 309, 312, 336). They depict in close detail various sexual activities engaged in by one person alone, or by couples, or by groups of persons.

Petitioner called two expert witnesses. Dr. Robert Loiselle, a psychologist, testified that the movies "P" and "Getting It On" do not appeal to prurient interests since they do not depict painful or violent sexual conduct (Tr. 463, 476-477). Dr. David Orr, a professor of English and student of European Renaissance drama, testified that all three films have literary merit (Tr. 487, 502).

ARGUMENT

1. Petitioner's hypertechnical objections to Agent Marcoline's affidavit, upon which the warrant issued, are without substance. Read in a "commonsense and realistic fashion" (*United States* v. *Ventresca*, 380 U.S. 102, 108), the affidavit provided an adequate basis for the magistrate's finding of probable cause that the films "P" and "Getting It On" had travelled in interstate commerce.[5]

[5] The portion of the affidavit relevant to the interstate transportation of the films appears at petitioner's Appendix D. The portion of the affidavit that describes the films to be seized appears in the joint appendix in the court of appeals at pages C3 through C9. That appendix, which is a part of the record, is on file with the Clerk of this Court.

The affidavit showed that on May 1, 1974, Agent Marcoline saw an advertisement in a local newspaper that "P" and an unspecified film would be shown at the Liberty Theater beginning on May 3. On May 1, Marcoline obtained a copy of a waybill from Assistant Terminal Manager James Tedesco of the Greyhound Bus Company in Pittsburgh. The waybill showed that an 11 pound box was shipped from Cleveland via Greyhound, a common carrier, on April 30, 1974. The package was addressed to Anthony Cesario, who picked it up on April 30.

Agent Marcoline also stated in his affidavit that on May 3 he interviewed Suzanne Simone, a cashier at the Liberty Theater. Simone stated that Cesario was the theater manager and that on April 30 he had telephoned a Greyhound employee and asked whether a box had arrived for him: Cesario then said that he was going to the Greyhound Station to pick up the film to be shown on Friday, May 3. Simone was present when Cesario returned to the theater carrying a box which he said contained the film previously mentioned. On May 1 Cesario told Simone that two films, "P" and "Getting It On," would begin showing on May 3.

Finally, Marcoline stated that he had viewed the films at the Liberty Theater on May 3 and that they were still showing there on May 8.

a. The Greyhound waybill showing that Cesario picked up a package addressed to him at the time and place related by Simone sufficiently corroborated Simone's information. See *Spinelli* v. *United States*,

393 U.S. 410, 416-418; *Draper* v. *United States*, 358 U.S. 307. Contrary to petitioner's claim, the corroborating facts were not insufficient because they were not independently incriminating, since wholly innocent facts may serve as adequate corroboration. See, *e.g.*, *Draper* v. *United States*, *supra*, 358 U.S. at 309-310.

b. Moreover, the affidavit sufficiently established Simone's reliability. Unlike the unnamed informants in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, *supra*, Simone was identified by name and as the cashier at the Liberty Theater. Any skepticism which might properly have greeted information gained from an anonymous informant was not called for here, since the affidavit established Simone as a citizen witness in a position to know about matters concerning the theater and the films.[6] Contrary to petitioner's contention (Pet. 12-13), there is no requirement that the credibility of a citizen witness be supported by an *Aguilar*-type statement that the witness is credible, and in light of all the circumstances described in the affidavit the magistrate was justified in determining that Simone was credible without such a statement having been made. See *United States* v. *McCoy*, 478 F.2d 176, 179 (C.A. 10), certiorari denied, 414 U.S. 828; *United States* v. *Unger*, 469 F.2d 1283, 1286-1287 (C.A. 7), certiorari denied, 411 U.S. 920. See generally Thompson and Starkman,

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[6] There is nothing in the affidavit or in the record supporting petitioner's speculation (Pet. 16) that Simone could have been a professional informant.

The Citizen Informant Doctrine, 64 J. Crim. L. & C. 163 (1973).

c. Petitioner's attack (Pet. 18-19) on the trustworthiness of Cesario's statements to Simone regarding the film contained in the package is likewise insubstantial. Cesario's statements were declarations against penal interest which "carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search." *United States* v. *Harris*, 403 U.S. 573, 583.[7]

d. Petitioner urges (Pet. 21-22) that even if there was probable cause to seize the movie "P," there was no reason to believe that the movie "Getting It On" was transported in interstate commerce. The issue arises from inconsistent uses of the word "film."

In his affidavit Marcoline stated that he had seen an advertisement for a showing of "P" and an additional unspecified film; that Simone heard Cesario say on April 30 that "he (Cesario) was going * * * to pick up the film to be shown commencing Friday, May 3" (Pet. App. D, p. 38); and that Simone had seen Cesario enter the theater carrying a box which he said contained "the film above mentioned" (*ibid.*).

Petitioner claims that the last use of the word "film" above must refer only to the movie "P" because "P" is the only movie "above mentioned." However,

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[7] Petitioner urges that "Cesario did not admit a crime but only receipt of a film which was later judged to be obscene" (Pet. 19). That asserted distinction is of doubtful relevance in light of the content of the films, and is further weakened by Cesario's remark prior to picking up the films that he did not want to "hang" for anyone (Tr. 155).

it was reasonable for the magistrate to assume that the word "film" was used as a plural rather than, or as well as, a singular noun. Webster's *Third New International Dictionary* 850 (1971); Funk & Wagnall's *Standard College Dictionary* 498 (1966). The affidavit refers to the newspaper advertisement that two films would be shown at the Liberty Theater on May 3. Cesario advised Simone that he had picked up the film to be shown on May 3 and that "P" and "Getting It On" would both be shown commencing on that date. On May 3 Marcoline viewed both "P" and "Getting It On."

In sum, the affidavit contained sufficient facts from which the magistrate could conclude that there was probable cause to believe that both movies travelled in interstate commerce.

2. Petitioner contends (Pet. 20-21) that seizure of obscene materials must be founded on a higher degree of probable cause than is required in other circumstances. The cases upon which petitioner relies, however, do not support this proposition,[8] and in any event the affidavit here satisfied any reasonable standard of probable cause. In addition, the magistrate himself

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[8] Both *Marcus* v. *Search Warrant*, 367 U.S. 717, and *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, held that police officers' conclusory assertions of obscenity were inadequate bases upon which to issue warrants. No claim is made here that the assertions of obscenity were conclusory. In *Stanford* v. *Texas*, 379 U.S. 476, this Court held simply that when the items to be seized may warrant First Amendment protection, they must be described with sufficient particularity to avoid the evils of a general warrant. *Roaden* v. *Kentucky*, 413 U.S. 496, held only that the warrantless seizure of films was unreasonable absent exigent circumstances.

viewed the films (Tr. 255). Thus the magistrate was given full opportunity to "focus searchingly on the question of obscenity"; and the procedures here were adequate "to avoid suppression of constitutionally protected publications." *Marcus* v. *Search Warrant*, 367 U.S. 717, 731, 732.

3. Petitioner contends that a hearing should have been held on his motion, first made in the middle of trial, to suppress the film "It Happened In Hollywood" (Pet. 23-25). Petitioner's claim that he was surprised at the government's offer of this evidence is without merit: prior to trial the prosecutor, in response to a motion for discovery, informed petitioner that the film, as well as several others which were also identified by name, might be shown at trial (Tr. 327). Local police officers acting pursuant to a warrant had seized "It Happened In Hollywood" from petitioner's Roxy Theater in Cleveland well before trial (Tr. 323-325). The district court denied petitioner's mid-trial motion to suppress on the ground that it was untimely and because it appeared from the evidence that the film had been legally seized (Tr. 328-329).

The district court correctly determined that the mid-trial motion for a hearing was untimely. See *Nardone* v. *United States*, 308 U.S. 338, 341-342. Moreover, petitioner presented to the court no reason why the film should have been suppressed or why a hearing was necessary (Tr. 326-330). Absent an assertion that the motion was based on facts which might arguably warrant suppression, a hearing was not required. *Nardone* v. *United States*, *supra*, 308

U.S. at 342; *United States* v. *Culotta*, 413 F.2d 1343, 1345 (C.A. 2), certiorari denied, 396 U.S. 1019; *Cohen* v. *United States*, 378 F.2d 751, 760-761 (C.A. 9), certiorari denied, 389 U.S. 897.

Petitioner states (Pet. 22-23) that the Cleveland magistrate who authorized the seizure of "It Happened In Hollywood" had not previously viewed the film and notes that the constitutionality of such a procedure was specifically reserved in *Lee Art Theatre* v. *Virginia*, *supra*, 392 U.S. at 637. Petitioner did not, however, raise this issue at trial. Moreover, the affidavit underlying the Cleveland warrant is not part of the record and so it cannot be determined whether it might have been sufficiently descriptive for the magistrate to make an objective determination on the issue of obscenity without viewing the film. In these circumstances, the issue is not properly presented to this Court. *Hormel* v. *Helvering*, 312 U.S. 552, 556; see *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2.[9]

4. Petitioner contends that the district court erred in excluding the results of a survey purporting to show contemporary community standards (Pet. 25-28). The survey asked interviewees whether or not they favored the showing of films containing explicit sexual material (Tr. 386). The trial judge found

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[9] We believe, in any event, that a magistrate need not in all cases view the film to be seized prior to issuing a warrant. See *United States* v. *Sherpix, Inc.*, 512 F.2d 1361, 1368-1369 (C.A.D.C.); *Perial Amusement Corp.* v. *Morse*, 482 F.2d 515, 524 (C.A. 2); see also *United States* v. *Cangiano*, 491 F.2d 906, 913 (C.A. 2), certiorari denied, 419 U.S. 904.

the survey inadmissible on the grounds that "the answers to the questions would not be relevant or probative as to community standards with respect to these particular movies * * * because there is more than just explicit sexual conduct in these movies and there is more than deviant conduct" (Tr. 388).

Without disputing the general proposition that surveys of community standards are admissible in obscenity cases, we submit that surveys, like any other form of evidence, must be relevant to the case under consideration to satisfy threshold requirements of admissibility. The district court retains broad discretion in determining relevancy (*Hamling* v. *United States*, 418 U.S. 87, 124-125), and the district court did not abuse that discretion in excluding the evidence once it had found that the survey "is not probative of anything with respect to the community standards that would apply in this case * * * [since] the questions asked * * * do not cover the conduct * * * as depicted in the movie" (Tr. 388-389). Cf. *Jenkins* v. *Georgia*, 418 U.S. 153; *Hamling* v. *United States*, *supra*, 418 U.S. at 108-110.

In any event, an expert witness called by petitioner testified that under "contemporary norms" the films do not appeal to prurient interests (Tr. 463), and petitioner's counsel argued to the jury that the films were not obscene on the basis of that testimony (Tr. 595). Thus, even if it was error to exclude the survey, the error was harmless. *Hamling* v. *United States*, *supra*, 418 U.S. at 108-110.

5. Petitioner asserts that the patent offensiveness of films challenged as obscene should be judged by the

standards of those who attend "adult theaters" (Pet. 28-29). Petitioner bases this contention on *Mishkin* v. *New York*, 383 U.S. 502, in which this Court held that "[w]here the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large," the question whether it appealed to prurient interests may be "assessed in terms of the sexual interests of its intended and probable recipient group" (383 U.S. at 508, 509). But the films here were not designed for any identifiable deviant sexual group and they were disseminated to the general public. *Mishkin* is therefore inapposite.

6. The jury was instructed in accordance with the standards set forth in *Miller* v. *California*, 413 U.S. 15, 24, and the films fall squarely within the "plain examples" of obscenity noted in *Miller* (*id.* at 25). There is, accordingly, no need for this Court further to review the issue.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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